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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

MUHAMMAD MOHSIN, Plaintiff and Appellant, v. GELTMORE 4G, LLC et al., Defendants and Respondents.	E067493 (Super.Ct.No. RIC1404227) OPINION

APPEAL from the Superior Court of Riverside County. Gloria Trask, Judge. Affirmed.

D'Attaray Law, Law Office of Mainak D'Attaray and Mainak D'Attaray for Plaintiff and Appellant.

Best Best & Krieger, James B. Gilpin; Anderson, McPharlin & Conners, Vanessa H. Widener and Elmira R. Howard for Defendant and Respondent Geltmore 4G, LLC et al.

Law Offices of Douglas Lee Weeks and Douglas Lee Weeks for Defendant and Respondent Town & Country Escrow Corp.

Law Office of Sunil A. Brahmbhatt, Sunil A. Brahmbhatt and Timothy I. Mulcahey for Defendants and Respondents Mohamad Saiful Hassan and Ruhi Fatema Hassan.

In April 2014, Muhammad Mohsin (Mohsin) sued (1) Geltmore 4G, LLC (Geltmore); (2) Two Guys, LLP (Two Guys); (3) BOKF, NA, doing business as Bank of Albuquerque (Bank); (4) Mohamad Saiful Hassan; (5) Ruhi Fatema Hassan (Ruhi)[1]; (6) Strata Realty, Inc. (Strata); (7) Adam N. Silverman; (8) Town & Country Escrow (Escrow); and (9) Northwest Aviation Services Group, LLC. A copy of the complaint is not included in the record on appeal. However, the judgment reflects the causes of action included: (A) quieting title; (B) cancellation of an instrument; (C) constructive trust; (D) negligence; and (E) intentional infliction of emotional distress.

Trial commenced on September 26, 2016. On October 5, Mohsin's attorney, Mainak D'Attaray, requested a continuance or stay of the trial because a warrant for Mohsin's arrest had been issued in Bangladesh. The trial court denied the request. Mohsin traveled from California to Bangladesh, arriving on October 7.

On October 11, Geltmore, Bank, Two Guys, Escrow, Hassan, and Ruhi requested the case be dismissed for failure to prosecute due to D'Attaray failing to provide witnesses to testify. D'Attaray asserted he could not present the case without incriminating Mohsin in the Bangladesh case. Mohsin had not yet testified, and his testimony was critical to the instant case. D'Attaray again requested a continuance or a

[1] We use Ruhi's first name for the sake of clarity because two parties have the last name of Hassan; no disrespect is intended.

stay. The trial court granted the motion to dismiss the case with prejudice. (Code Civ. Proc., § 581, subd. (d).)[2] The trial court denied Mohsin's motions to set aside the judgment, reconsider dismissal, or grant a new trial.

Mohsin raises five issues on appeal. First, Mohsin contends the trial court violated his right against self-incrimination by not continuing or staying the trial. Second, Mohsin asserts the trial court erred by not continuing the trial. Third, Mohsin contends the trial court erred by denying his request to set aside the judgment. Fourth, Mohsin asserts the trial court erred by not granting reconsideration. Fifth, Mohsin contends the trial court erred by not granting his request for a new trial. We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

A. HASSAN AND RUHI'S TRIAL BRIEF

Hassan and Ruhi (collectively, the Hassans) filed a trial brief. The facts provided in the trial brief are as follows: On September 19, 2012, Hassan purchased a commercial warehouse property in Corona (the property). Despite Hassan buying the property, title was placed in Mohsin's name "to assist [Mohsin] in his immigration application." Mohsin claimed that Mohsin paid for the property, and that he made the purchase through his sister, who resides in Dubai, United Arab Emirates.

Hassan managed the property, which was rented to a tenant. Mohsin was in Bangladesh. After two years, Hassan advised Mohsin that the property needed to be

[2] All subsequent statutory references will be to the Code of Civil Procedure unless otherwise indicated.

sold. Mohsin verbally approved of Hassan selling the property. Hassan retained Strata and Silverman to handle the sale. To facilitate the sale without Mohsin, Hassan filed a fictitious name statement in Riverside County. The statement read, "Mohamad Saiful Hassan, who acquired title as, Muhammad Mohsin." (Boldface and italics omitted.) The property was sold to Geltmore, which was owned by Silverman's family.

Mohsin was a citizen of Bangladesh. Bangladesh restricted its citizens from conducting financial transactions outside of the country. Citizens of Bangladesh must obtain government approval to own real property outside of Bangladesh. Bangladesh required its citizens to disclose, on their tax returns, any ownership of foreign real property. Mohsin did not report ownership of the property on his tax returns.

Strata and Silverman settled with Mohsin. On September 21, 2016, the Republic of Bangladesh intervened in the case to enjoin distribution of the settlement proceeds. The Republic of Bangladesh alleged Mohsin engaged in money laundering, which is a criminal offense. In Bangladesh, Mohsin denied any ownership interest in the property.

B TRIAL

Prior to trial, Mohsin filed an ex parte application to continue the trial. A copy of the application is not included in the record. On August 24, 2016, the trial court denied Mohsin's ex parte application to continue trial.

Trial commenced on September 26, 2016. On September 26, Mohsin's attorney was Andrew Ritholz. Mohsin was present in court, with an interpreter. Ritholz gave an opening statement. In the opening statement, Ritholz described how the evidence would show Hassan used fraud and forgery to take the property from Mohsin. Ritholz called

Hassan to testify. Ritholz questioned Hassan and utilized exhibits. That evening, Mohsin and Ritholz argued over Ritholz's handling of the case.

On September 27, Ritholz was present in court. Ritholz told the court that Mohsin wanted to hire a new attorney due to irreconcilable differences between Mohsin and Ritholz, and he requested a continuance in order for Mohsin to retain new counsel. Mohsin said he was "not agreeing on a lot of things" with Ritholz and they were miscommunicating. The court said, "Mr. Ritholz has been your attorney for a while. Another attorney would not necessarily guarantee anything different is going to happen. . . . [¶] . . . [¶] We are in the middle of trial. [¶] There are five attorneys sitting here prepared to go forward with this trial. [¶] You are telling me that you want a different attorney; is that right?"

Mohsin said he wanted a new attorney due to the "breakdown in communications" between himself and Ritholz. The court asked, "Are you sure that is what you want?" Mohsin said he wanted a new attorney. The trial court said it would not force Mohsin to work with Ritholz, and therefore, relieved Ritholz of further representation of Mohsin.

The court informed Mohsin that he was self-represented and that trial was underway. The court said, "We cannot continue this case for any period of time to allow an attorney to be prepared to present the case. I will give you until 1:30, and we will recess until 1:30, and you can tell me whether . . . you have an attorney or not. [¶] This is not—This is of some urgency because we are all here ready for trial. We are in trial. We are taking testimony. And if necessary you will present the case."

Mohsin requested a continuance so he could hire a new attorney. The court said, "I don't think [you] appreciate[] the expense and prejudice to the other parties. [¶] We'll come back at 1:30, and you will tell me what your plan is and what you have done. Otherwise, we will continue with the trial as it is." When court resumed, Mohsin said he had spoken to an attorney, D'Attaray, and that D'Attaray would appear on Thursday, September 29.[3]

When the trial court asked exactly what D'Attaray would be prepared to do on Thursday, Mohsin asked for a continuance. The trial court said, "Well, surely [you] understood when [you] fired [your] lawyer that [you] were in the middle of trial. So the court cannot just stop a trial because [you] do[n't] like what's happening." The court again asked what D'Attaray would be doing in court on Thursday. Mohsin said D'Attaray would not be prepared to continue with trial on Thursday.

Mohsin asserted that because of the breakdown in communication with Ritholz, he needed a continuance. The trial court said, "I struggle with the breakdown in communication because I don't know what changed from one day to the next. Whereas Mr. Ritholz has represented [you] for some period of time, it is not as though [you] just learned that he . . . wasn't . . . fluent in Bengali . . . [you] knew the level of communication for some period of time. So I struggle to understand what is new in all of that." The trial court scheduled an order to show cause re: retainer of plaintiff's counsel for Thursday, September 29.

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[3] We take judicial notice that September 29, 2016, was a Thursday. (Evid. Code, § 451, subd. (f).)

On September 29, the trial court held the hearing on the order to show cause. D'Attaray had not substituted into the case. On September 29, D'Attaray made an oral motion for a 60-day continuance so that he could prepare for trial because the boxes that had been delivered by Mohsin, from Ritholz, were disorganized. The Hassans, Geltmore, Bank, and Two Guys opposed the request because they spent time and money preparing for trial and traveling to be present for trial.

The trial court said, "Mr. Mohsin did not arrive from his country until sometime during the weekend. So he wasn't even here for the start of the trial. So his—his dissatisfaction or his firing his attorney is—the court considers it to be brought about by his own conduct in not participating in this trial." The trial court continued, "Mr. Mohsin is the plaintiff. Mr. Mohsin knows his visa requirements or limitations. He retained this attorney on his own. So as a plaintiff he has certain obligations to move the case forward." The court said, "Again, the onus in on Mr. Mohsin who hired this counsel who would have spoken with him, supervised him, participated in the preparation. That is all—the phone book is—is filled with lawyers. He chose this one. He worked with him. If he didn't, that should not be to the detriment of counsel." The court concluded, "All of this is caused by plaintiff's behavior and lack of diligence. It's denied."

On October 3, D'Attaray substituted in as counsel for Mohsin. Trial resumed on October 3. D'Attaray filed an ex parte application to continue trial. D'Attaray argued (1) a witness was unavailable to testify due to a Jewish holiday; (2) Bangladesh launched a formal criminal inquiry into the allegations against Mohsin; and (3) Mohsin

had to travel to Bangladesh within the week. The trial court explained that the witness could testify out-of-order so as to not have a conflict with the holiday, and there was no evidence reflecting Mohsin was required to be in Bangladesh. D'Attaray explained that if the instant trial proceeded then Mohsin "might incriminate him[self] in the criminal matter."

The Hassans' attorney asked if Mohsin planned to take the Fifth Amendment when testifying. The Hassans' attorney explained that there was no reason to continue with the trial if Mohsin planned to take the Fifth Amendment because, in that situation, Mohsin would be unable to prove his case. D'Attaray was unable to say if Mohsin would take the Fifth Amendment because D'Attaray did not "understand what's at issue in Bangladesh necessarily and what he can testify to and what he can't testify to." The trial court denied Mohsin's ex parte application to continue trial. Hassan resumed testifying. Hassan was the only witness to testify on October 3.

On the morning of October 4, D'Attaray requested a recess until 1:30 p.m. because there were "some happenings happening in Bangladesh in terms of the criminal matter that need to be resolved just really quickly." The trial court denied the request. Hassan resumed testifying. Hassan was the only witness to testify on October 4.

On the morning of October 5, D'Attaray requested the case be stayed because Bangladesh had issued an arrest warrant for Mohsin, and Mohsin needed to return to Bangladesh to respond to the charges and Mohsin "cannot testify in this matter [because i]t will in fact implicate or trigger his Fifth Amendment rights . . . ." The trial court said that Mohsin was free to leave and could present the instant case in any manner he saw

fit. The trial court explained that Mohsin had been aware of possible charges against him in Bangladesh so "[t]here's really nothing new."

D'Attaray argued that Mohsin's company employed 20,000 people in Bangladesh, Mohsin's assets were being frozen, and his businesses were being seized. Therefore, there was good cause for the stay because Mohsin needed to return to Bangladesh to address the criminal issues so the companies' employees could be paid. The court explained that Mohsin was free to address his business issues. The trial court denied D'Attaray's request for a stay.

D'Attaray again argued that there was good cause for a stay of the trial. D'Attaray contended, "The criminal matter should take priority." D'Attaray argued that because there was not a jury, the court could accommodate a stay of the trial and the parties would not be prejudiced by the stay because it would permit Mohsin to testify freely. The trial court told D'Attaray to call his witness. D'Attaray called Hassan. Hassan was the only witness to testify on October 5.

On October 6, one of the defendants called Paul Silverman to testify. Paul Silverman was called out-of-order due to a surgery scheduled for October 10. Paul Silverman was the principal for Geltmore. D'Attaray called Pamela Walker to testify. Also on October 6, Mohsin traveled from California to Bangladesh, arriving in Bangladesh on October 7. On Tuesday, October 11, D'Attaray called Alan Wallace and

Stacey Kinsel (Kinsel) to testify.[4] Kinsel was a forensic accountant. D'Attaray questioned Kinsel about wire transfers from Dubai. The Hassans' attorney objected, arguing that the document upon which Kinsel was relying lacked foundation.

D'Attaray said that Mohsin provided the document to Kinsel and that when Mohsin testified, he would authenticate the document. The trial court said Kinsel could not opine on the document until a foundation was laid.[5] D'Attaray resumed examining Kinsel. D'Attaray asked one question. The Hassans' attorney objected on the basis of the question already having been asked and answered, and the trial court sustained the objection.

D'Attaray then requested a continuance so Mohsin could authenticate the document. D'Attaray said Mohsin had posted bail in Bangladesh and would return to California "this weekend." The court explained that there would be little point in continuing the trial if Mohsin planned to take the Fifth Amendment. D'Attaray explained that other witnesses were unavailable to testify due to a religious holiday. D'Attaray said, "So based on—on these unavailability [*sic*], I won't have anyone to call tomorrow. I'm running out of witnesses. And I don't want to waste the expert's time."

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[4] This court takes judicial notice that October 11, 2016, was a Tuesday. (Evid. Code, § 451, subd. (f).)

[5] The record reflects the trial court said, "Until a foundation is laid the witness conditioned opine on this document." From context in the record, we infer the trial court said "cannot opine on this document," rather than "conditioned opine on this document."

The Hassans' attorney said, "We sat here for four days taking Mr. Hassan's testimony while Mr. Mohsin sat in the chair next to counsel. He was in this courtroom. He could—He knew he was leaving the country. He could have easily been put on the stand. . . . [¶] If that's their trial strategy or whatever strategy, they have to live by it. We've been prejudiced now so many times in this case. I've got a trial that's right now trailing in complex courts in Orange County because of this case. [¶] . . . It's just one delay after another. And he had every option to put Mr. Mohsin in that stand over there for four days, and he chose not to. Now Mr. Mohsin believed that his priorities are in Bangladesh, not here."

The trial court denied D'Attaray's request for a continuance. The trial court found good cause was not shown. The court explained, "I have said repeatedly that he's in charge of his case. If he chooses to be here or not, that's his decision." The court asked D'Attaray, "What would you like to do? Shall we excuse this witness?"

D'Attaray responded, "For now I'd like to reserve the opportunity to resume her questioning if I decide to call her later. [¶] I'm going to try however I can to communicate with Mr. Moshin to come as soon as possible. I don't know who we'll call in the interim. There are no witnesses available. If counsel would like to take witnesses out of order, it may serve the interest of judicial efficiency, economy of time to do so without resting our case." The trial court responded, "Well, let's deal with this witness first, with regard to this witness may she be excused?" The defense attorneys said they did not have questions for Kinsel at that point in time. The trial court excused

Kinsel. The trial court took a 10 minute recess so the attorneys could "discuss the witness issue."

C. MOTION TO DISMISS

When court resumed, the attorneys had not reached an agreement on how to proceed. Geltmore's and Bank's attorney said, "There are twelve witnesses that are left on the witness list that were identified by the plaintiff that he indicated he was going to call. Mr. D'Attaray represents he has no other witnesses available or ready to testify. . . . We are now going into week three of what was supposed to be a seven—to ten-day trial. [¶] The issue of the testimony of Miss Kinsel, her deposition was two and a half hours. There were a myriad of other things that we could have covered today separate and apart from the one issue of the . . . note that there wasn't a foundation for. So it seems that this is more of a strategy and a delay tactic to kind of keep kicking this down the road unless and until Mr. Mohsin decides that he's going to come back and testify or not. . . . [¶] . . . [¶] And at this point there are no other witnesses ready to call; and I just think that's inexcusable. And I would like the case to be dismissed."

The Hassans' attorney said, "I've made this request before for failure to prosecute. . . . And I'm going to request that the court consider that again under 583 or 581 . . . . [¶] And I think that we've been all very accommodating and biting our lip for three weeks; but this case is going absolutely nowhere. . . . [H]e's just not prepared to put on his case, and I think it's sufficient grounds for failure to prosecute." Escrow said it joined in the motion to dismiss for failure to prosecute.

D'Attaray asserted, "Mr. Mohsin's been put into a Sophie's Choice in many ways where he either has to abandon his property interest for his liberty interest or his liberty interest for his property interest." D'Attaray asserted the court could "very easily, looking at the equities, stay this matter. There's really no prejudice in staying it until such time as the criminal matter is resolved." D'Attaray contended it was probable that Mohsin would "plea bargain, and resolve the dispute short of prison."

D'Attaray continued, "Insofar as the failure to prosecute, we're ready to prosecute the case. I have witnesses scheduled for Thursday. It's the holiday, the Jewish holiday. It's Yom Kippur. . . . [M]any of the witnesses happen to be Jewish. And because of that they're unavailable tomorrow . . . . [¶] I'll resume on Thursday, and Mr. Mohsin assured me through a third party that he's going to be here on Saturday. And Mr. Mohsin will be on the stand Monday."

The court asked, "Who is your next witness?" D'Attaray responded, "It will be Adam Silverman on Thursday . . . ." The trial court asked if Silverman had been subpoenaed. D'Attaray said he had not been subpoenaed, but that he was "under agreement" to appear on Thursday. The court asked who else would testify. D'Attaray replied, "Darren Silver . . . . His issue is also the holiday. He also asked me to request the court if we could do his examination by written interrogatories . . . but I said that it was unlikely and I would enforce the subpoena that we have for him."

The attorney for Geltmore and Two Guys explained that Yom Kippur "begins at sundown tonight and ends at sundown tomorrow." The attorney for Geltmore and the Bank said that Darren Silver was "the EB-5 visa attorney. . . . I can't imagine . . . that

his testimony would last more than thirty minutes; and that's being generous. And I see no reason why he could not have been called over the past two and a half weeks . . . . [¶] . . . [¶] [o]r this afternoon." D'Attaray agreed that Darren Silver could have been called in the past two weeks, but asserted he "wasn't available this afternoon."

The trial court asked D'Attaray, "Who's your next witness?" D'Attaray responded, "After that it will be Mr. Mohsin on Monday. [¶] And thereafter I have one other witness, and then we'll likely rest our case." Mr. Salam Dharia was identified as the final witness after Mohsin. The Hassans' attorney asserted there was a motion to exclude Salam Dharia's testimony because he was not disclosed as a witness during discovery.

Escrow asked for an offer of proof that Mohsin would not be taking the Fifth Amendment if he testified on Monday. D'Attaray said, "I haven't spoken to the client since last Thursday." Nevertheless, D'Attaray believed that Mohsin would not take the Fifth Amendment. The Hassans' attorney said he was concerned because (1) D'Attaray had not spoken to Mohsin; and (2) Bangladeshi newspapers were reporting that Mohsin was "a fugitive and he's in hiding and he has not reported" to be arrested. The Hassans' attorney asserted Mohsin should have testified during the first four days of trial, when he was present in court.

The trial court asked D'Attaray if he had been in direct contact with Mohsin. D'Attaray responded, "I have not since last Thursday." The trial court said it would not rely upon newspaper articles as sources of information. The trial court explained, "[W]e don't know anything really. We don't know if he's even in Bangladesh since he

hasn't contacted his lawyer. We don't know if he is in or out of custody since he hasn't told his lawyer any of those things. He hasn't contacted his lawyer even to find out what's going on with this case. So I'm skeptical whether or not he would even be here on Monday because if he was that concerned, he would have told you exactly what's going on and to beg the court's indulgence and that he has airline tickets and in fact these are the airline tickets to bring him back."

The court continued, "With regard to Adam Silverman and Darren Silver, they're really not the issue. If Mr. Mohsin can't testify, I don't know what we have. I could be wrong since I don't know the case. But it seems to me that without Mr. Mohsin there is no case. [¶] Am I correct in that analysis." Geltmore's and Bank's attorney said, "We think it's a fundamental issue in this case, right, Your Honor." The Hassans' attorney said, "I totally agree."

The court said, "[T]he court has no assurances that Mr. Mohsin will be here because of this lack of communication with his counsel or the court. And so I have no reason to believe he'll be here. That's my concern." D'Attaray suggested the trial court set an order to show cause re: failure to prosecute for Monday morning, and if Mohsin failed to appear then the court "would probably be correct in perhaps dismissing the case for failure to prosecute." The trial court asked if D'Attaray had spoken to Mohsin about Mohsin being in court on Monday. D'Attaray said he had spoken to people in Mohsin's "entourage."

Geltmore's and Bank's attorney said, "I renew my request that the case be dismissed. We don't have any assurances that Mr. Mohsin will be returning and, if he

does return, whether or not he will take the stand and actually testify. If he's truly unavailable, then use his deposition transcript . . . . I assume counsel is not amenable to doing that because, again, there's the Fifth Amendment issues. And so that's the problem. . . . I'm not inclined to say let's come back Monday morning for an OSC so we can all be surprised to see whether or not he's here and if he's going to testify or not and everything else in between."

D'Attaray asserted criminal cases take priority over civil cases and that "the best solution is a wait-and-see approach if only for a few days. Because if Mr. Mohsin shows up on Monday, he'll only be showing up to testify and not take the Fifth Amendment . . . ." The trial court said its tentative ruling was to dismiss the case with prejudice. The trial court adjourned for the day to give "Mr. D'Attaray an opportunity to maybe speak with his client," and to give the attorneys the opportunity to draft documents with "some code sections and some findings."

On the morning of October 12, the trial court said it received a proposed statement of decision re: dismissal with prejudice from the Hassans' attorney and a motion for judgment from Geltmore's attorney. D'Attaray said he had not drafted anything, and requested the opportunity to respond to the documents in writing. The trial court asked if Silverman's and Darren Silver's testimonies "would only supplement that of Mr. Mohsin's." D'Attaray said their testimonies would be supplementary to Mohsin's testimony, and that Mohsin's testimony was necessary to proving his case. D'Attaray said Mohsin's assistant confirmed via e-mail last night that Mohsin would be present in court on Monday.

The court asked, "You have not personally talked to him, and you have not received a fax or any sort of declaration or anything from him, correct?" D'Attaray replied, "Not from him directly, Your Honor, no." The court said, "And you have no personal knowledge where he is presently." D'Attaray responded, "On information and belief I know he's in Bangladesh because . . . [¶] . . . [¶] . . . I can't imagine him being anywhere else." The court asked if D'Attaray had information about any airline tickets that had been purchased for Mohsin. D'Attaray said he did not have any information about airline tickets.

The trial court said, "I think that what is appropriate under the circumstances is to grant the request for dismissal for failing to prosecute as requested by defendant Hassan pursuant to 581(d), just failure to prosecute, meaning failure to present evidence and without any hope or expectation that the—that Mr. Mohsin will come here and testify and prove up his case.

"I have reviewed defendant Geltmore's motion for judgment, and I can honestly say that I have played out all the scenarios of what happened and what do we call this and how do we treat these different things. And the state of the evidence is so negligible that I just couldn't make any of these findings in a motion for judgment. All I can say is plaintiff hasn't begun to prove their case. I would analogize this to an airplane that never got off the runway." The court explained that the motion for judgment requested the court make certain factual findings, such as a finding that a partnership existed. The court said it could not make that finding because Hassan's testimony had been contradictory.

The court said, "Bottom line is the court finds that Mr. Mohsin has failed to prosecute his case and present his evidence. The court has given him every opportunity to present it, has been patient, has inquired; and I just have no assurances whatsoever that he will be here on Monday or even what he will do if he is here on Monday because we've heard so many different things. And the time has come to be fair to the defendants as well as the plaintiff and consider the prejudice to them to continue to keep them hanging." The court ordered the case dismissed with prejudice. (§ 581, subd. (d).)

DISCUSSION

A. VIOLATION OF FIFTH AMENDMENT RIGHT

Mohsin contends the trial court violated his Fifth Amendment Right against self-incrimination by not continuing the trial.

We apply the de novo standard of review to this constitutional issue. (*In re H.K.* (2013) 217 Cal.App.4th 1422, 1433.) "The Constitution does not ordinarily require a stay of civil proceedings pending the outcome of criminal proceedings." (*Keating v. Office of Thrift Supervision* (9th Cir. 1995) 45 F.3d 322, 324; see also *People v. Coleman* (1975) 13 Cal.3d 867, 885 [courts have "consistently refrained from recognizing any Constitutional need" for a continuance]; see also *Avant! Corp v. Superior Court* (2000) 79 Cal.App.4th 876, 882 [constitution is not implicated in a request to stay discovery in civil proceedings to await a related criminal case].) Our Supreme Court has explained, "It seems fairly clear that one liable to criminal prosecution who undertakes Himself to litigate related issues as a Plaintiff in a civil suit, is entitled to no relief from the peril of self-incrimination." (*Coleman*, at p. 884.)

Mohsin was the plaintiff in this case. Mohsin does not explain where in the Fifth Amendment there is a right to a continuance. Mohsin does not explain how he, as a plaintiff, was entitled to a continuance under the Fifth Amendment following his choice to sue the defendants over a subject that would cause him to incriminate himself. Additionally, the Fifth Amendment does not apply to protect a person from incriminating himself in a foreign criminal prosecution, e.g., prosecution in Bangladesh. (*U.S. v. Balsys* (1998) 524 U.S. 666, 669, 672 ["foreign prosecution is beyond the scope of the Self-Incrimination Clause"].) In sum, because (1) Mohsin has not demonstrated he had a constitutional right to a continuance; (2) Mohsin is the plaintiff in this case; and (3) the Fifth Amendment right against self-incrimination does not apply when the prosecution is in a foreign country, we conclude the trial court did not violate Mohsin's right against self-incrimination by denying his request for a continuance.

B. CONTINUANCE

1. *CONTENTION*

Mohsin contends the trial court erred by not granting a continuance. Mohsin does not provide record citations in regard to this issue. As a result, it is unclear which denial of a continuance he is focusing upon. (Cal. Rules of Court, rule 8.204(a)(1)(C) [provide record citations]; *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246 [failure to provide record citations forfeits the issue].) Typically, a request for continuance of trial must be made "by a noticed motion or an ex parte application . . . with supporting declarations." (Cal. Rules of Court, rule 3.1332(b).) The only written request for a continuance we see in the record is an ex parte application that was filed on October 3.

For the sake of addressing this issue, we will assume Mohsin's contention concerns the written October 3 ex parte application for a continuance.[6]

2. *STANDARD OF REVIEW AND LAW*

We apply the abuse of discretion standard of review. (*Slaughter v. Zimman* (1951) 105 Cal.App.2d 653, 624-625.) In order for a continuance to be granted, an affirmative showing of good cause must be made. (Cal. Rules of Court, rule 3.1332(c).) " '[T]he necessity for the continuance should have resulted from an emergency occurring after the trial setting conference that could not have been anticipated or avoided with reasonable diligence.' " (*Lazarus v. Titmus* (1998) 64 Cal.App.4th 1242, 1250; see also *Hamilton v. Orange County Sheriff's Dept.* (2017) 8 Cal.App.5th 759, 766 [diligence required].)

3. *NEW ATTORNEY*

One of the reasons for Mohsin's request for a continuance was that D'Attaray was new to the case. Mohsin hired Ritholz on February 16, 2016. Mohsin met with Ritholz when he retained him, at the mediation, and on the day before trial. It can be inferred from the record that Mohsin spoke or wrote to Ritholz in between their meetings. For example, Mohsin declared that he communicated with Ritholz about when Mohsin should arrive for trial, which implies Mohsin spoke or wrote to Ritholz between their meetings. Given Mohsin and Ritholz's communication between February

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[6] Geltmore, Two Guys, and Bank assert this court should strike the appellant's opening brief due to Mohsin's failure to provide record citations. We decline to strike the appellant's opening brief.

16 and September 26, with reasonable diligence Mohsin should have discovered any inability to clearly communicate with Ritholz. Mohsin's decision to wait until trial was underway to fire Ritholz due to an inability to clearly communicate shows a lack of diligence. Because Mohsin did not act diligently to prevent the situation, the trial court did not abuse its discretion by denying the request for a continuance.

In a declaration, Mohsin declared he argued with Ritholz on September 26 due to Ritholz's "performance and lack of preparation." Mohsin declared that he was unaware American lawyers are sometimes unprepared for trial because, in his experience, Bangladeshi lawyers are meticulous. Mohsin does not explain what, if anything, he did to assure he was comfortable with Ritholz's preparation from February to September. Mohsin asserts he met with Ritholz for the case mediation. Mohsin does not explain what, if any, problems with Ritholz's performance he became aware of during the mediation. Due to Mohsin's failure to show he acted diligently in discovering the alleged problems with Ritholz's performance, we conclude the trial court did not err by denying the ex parte application for a continuance.

4. *UNAVAILABLE WITNESSES*

Mohsin's second reason for wanting a continuance was that (1) Alan D. Wallace, a real estate expert, was unavailable to testify until October 12 due to Rosh Hashanah and Yom Kippur; and (2) Salam Dharia, who notarized documents at issue in the case and who would testify that Hassan forged notarized documents, was on a preplanned non-refundable vacation in Bangladesh from September 30 until October 19.

"To establish good cause for a continuance, [plaintiff] had the burden of showing that he had exercised due diligence to secure the witness's attendance, that the witness's expected testimony was material and not cumulative, that the testimony could be obtained within a reasonable time, and that the facts to which the witness would testify could not otherwise be proven." (*People v. Howard* (1992) 1 Cal.4th 1132, 1171.)

Dharia's declaration reflects he received a subpoena from Ritholz and was scheduled to testify between September 26 and 30. As a result of the subpoena, Dharia left his vacation in Bangladesh and returned to California. Dharia had a nonrefundable ticket to return to Bangladesh on September 30, and he planned to return to California on October 19. Dharia's declaration was dated September 30. D'Attaray's declaration reflects he spoke to Dharia and learned he was unavailable from September 30 to October 19.

There is nothing reflecting why Dharia was not called as a witness on September 26. There is nothing indicating whether Dharia was served with a second subpoena by D'Attaray after the trial was delayed. There is nothing indicating whether Dharia could have returned to California before October 19 if subpoenaed. For example, Dharia declares he had a nonrefundable ticket but fails to explain if he could change tickets without a penalty, i.e., not receiving a refund, but changing flights. Due to the lack of information concerning what efforts were made to secure Dharia's attendance at trial after September 30, the trial court did not err by denying the ex parte application for a continuance.

Trial began on September 26. In 2016, Rosh Hashanah began on the evening of October 2 and ended the evening of October 4, and Yom Kippur began the evening of October 11 and ended the evening of October 12.[7] A declaration by Wallace is not attached to the ex parte application. A copy of a subpoena for Wallace is not attached to the ex parte application. There is nothing indicating Wallace was subpoenaed to attend trial. Due to the lack of evidence concerning an effort to secure Wallace's testimony, we conclude the trial court did not err by denying the ex parte application. (*Jenson v. Superior Court* (2008) 160 Cal.App.4th 266, 271 ["When a witness is not under subpoena, his or her absence generally does not constitute good cause for the continuance of a trial"].)[8]

5. *CRIMINAL CHARGES*

The third reason for the requested continuance was that Mohsin was "facing a criminal inquiry" in Bangladesh, and the evidence supporting his claim in the instant case would incriminate him in Bangladesh. Mohsin contended that he could not be forced to choose between his interest in the property and his Fifth Amendment right against self-incrimination.

Our Supreme Court has explained, "It seems fairly clear that one liable to criminal prosecution who undertakes Himself to litigate related issues as a Plaintiff in a civil suit, is entitled to no relief from the peril of self-incrimination." (*People v.*

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[7] We take judicial notice of the 2016 dates of Yom Kippur and Rosh Hashanah. (Evid. Code, § 451, subd. (f).)

[8] The record reflects Wallace testified on October 11.

Coleman, *supra*, 13 Cal.3d at p. 884.) Mohsin chose to sue over the property. In order to prove his case, Mohsin would have to incriminate himself. Mohsin cannot receive a continuance when he placed himself in the situation of having to give incriminating evidence. (*Ibid.*) Accordingly, the trial court did not err by denying the ex parte application for a continuance.

C. POSTJUDGMENT EX PARTE APPLICATIONS AND MOTIONS

1. *PROCEDURAL HISTORY*

The judgment dismissing the case was filed on November 10, 2016. (§ 581, subd. (d).) Notice of entry of the judgment was mailed on November 10. On November 21, Mohsin filed ex parte applications to (1) set aside the judgment; (2) reconsider the order of dismissal; and (3) grant a new trial. That same day, the trial court denied the applications due to Mohsin's failure to "make an affirmative factual showing in a declaration containing competent testimony based on personal knowledge of irreparable harm, immediate danger, or any other statutory basis for granting relief ex parte." (Cal. Rules of Court, rule 3.1202(c).)

On November 22, Mohsin filed motions to (1) set aside the judgment; (2) reconsider the order of dismissal; and (3) grant a new trial. The hearing on the motions was scheduled for January 3, 2017. On December 12, 2016, Geltmore, Bank, and Two Guys filed an opposition to the motions. On December 13, the Hassans filed an amended opposition to the motions. On December 21, the trial court continued the hearing on the motions from January 3 to January 27. On January 6, Mohsin filed a notice of appeal.

On January 27, the trial court held a hearing on Mohsin's motions. Geltmore's and Bank's attorney asserted the trial court lacked jurisdiction to rule upon the motion to set aside the judgment and the motion for reconsideration because the notice of appeal had been filed. Geltmore's and Bank's attorney contended the motion for new trial was denied by operation of law because it was not heard within 60 days. (§ 660.)

D'Attaray argued that the motion was scheduled to be heard within 60 days, but the court rescheduled the hearing. The trial court said, "That doesn't change the 60 days." The court explained, "[S]omeone should have brought that to my attention. And had that been brought to my attention, I could have addressed that issue. So they are correct. If we are beyond—if it is beyond the 60 days, I lose jurisdiction and it is denied. If that's—that's black letter law. Everybody knows that. So I lose jurisdiction for the new trial."

The trial court concluded it lost jurisdiction over the motion to set aside the judgment after 60 days as well. The trial court concluded that the filing of the notice of appeal caused it to lose jurisdiction over the motion for reconsideration. (§ 916, subd. (a).)

2. *MOTION SETTING ASIDE THE JUDGMENT*

Mohsin contends the trial court erred by not granting his motion to set aside the judgment. (§ 473, subd. (d).)

" ' "[W]here several judgments and/or orders occurring close in time are separately appealable . . . , each appealable judgment and order must be expressly specified—in either a single notice of appeal or multiple notices of appeal—in order to

be reviewable on appeal."' [Citation.] The policy of liberally construing a notice of appeal in favor of its sufficiency [citation] does not apply if the notice is so specific it cannot be read as reaching a judgment or order not mentioned at all." (*Filbin v. Fitzgerald* (2012) 211 Cal.App.4th 154, 173.) An order denying a motion to set aside a judgment is a separately appealable order. (*Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 1004, 1008-1009; *Garcia v. City and County of San Francisco* (1967) 250 Cal.App.2d 767, 770.)

Mohsin's notice of appeal reflects he is appealing from the judgment entered on November 10, 2016. The notice of appeal was filed on January 6, 2017. The trial court ruled on Mohsin's motions on January 27. Because (1) the notice of appeal does not reference the order denying the motions; (2) the notice of appeal was filed before the order denying the motions; and (3) the denial of a motion to set aside a judgment is separately appealable, we do not construe Mohsin's notice of appeal as including the order denying his motion to set aside the judgment. Because the notice of appeal does not include the order denying his motion to set aside the judgment, we do not have jurisdiction to review the denial of the motion. (*Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc.* (1997) 15 Cal.4th 51, 56.)

3. *RECONSIDERATION*

Mohsin contends the trial court erred by denying his motion for reconsideration. "It is well settled that entry of judgment divests the trial court of authority to rule on a motion for reconsideration." (*Safeco Ins. Co. v. Architectural Facades Unlimited, Inc.* (2005) 134 Cal.App.4th 1477, 1482.) Judgment was entered on November 10. The

motion for reconsideration was filed on November 22. Because November 22 was after the entry of judgment, the trial court did not have authority to rule upon a motion for reconsideration. Accordingly, the trial court did not err.

4. *NEW TRIAL*

Mohsin contends the trial court erred by denying his motion for a new trial. (§ 657.)

"Section 660 gives the court power to rule on a new trial motion for '60 days from and after the mailing of notice of entry of judgment by the clerk of the court pursuant to [s]ection 664.5, or 60 days from and after service on the moving party by any party of written notice of the entry of the judgment, whichever is earlier.' " (*Dodge v. Superior Court* (2000) 77 Cal.App.4th 513, 515; see also *Collins v. Sutter Memorial Hospital* (2011) 196 Cal.App.4th 1, 11.)

The typical five-day extension of time for service by mail does not apply to motions for new trial. (§ 1013, subd. (a).) Case law holds, " '[T]he court must resolve the motion by 60 days from the date of mailing of notice of entry of the judgment; this time period is jurisdictional.' " (*Westrec Marina Management, Inc. v. Jardine Ins. Brokers Orange County, Inc.* (2000) 85 Cal.App.4th 1042, 1048.) If the court does not resolve the motion for new trial within 60 days, then the motion is denied by operation of law. (*Mellin v. Trousdell* (1949) 33 Cal.2d 858, 860.)

The notice of entry of judgment was prepared by Geltmore and Bank. The notice was mailed to D'Attaray on November 10, 2016. The trial court had jurisdiction over the motion for new trial for 60 days after November 10, 2016. The hearing on the motion for new trial took place on January 27, 2017. January 27, 2017 is more than 60 days after November 10, 2016. Accordingly, Mohsin's motion for new trial was properly denied by operation of law when, after 60 days, the motion had not been ruled upon. The trial court did not err.

5. *EX PARTE APPLICATIONS*

Mohsin contends the trial court erred by denying his postjudgment ex parte application to (1) set aside the judgment; (2) reconsider the order of dismissal; and (3) grant a new trial.

In an ex parte application, the "applicant must make an affirmative factual showing in a declaration containing competent testimony based on personal knowledge of irreparable harm, immediate danger, or any other statutory basis for granting relief ex parte." (Cal. Rules of Court, rule 3.1202(c).) We apply the abuse of discretion standard of review. (*Hupp v. Solera Oak Valley Greens Assn.* (2017) 12 Cal.App.5th 1300, 1309; *Contemporary Services Corp. v. Staff Pro Inc.* (2007) 152 Cal.App.4th 1043, 1060-1061.)

Mohsin asserted, that he was "seeking ex parte relief due to filing deadlines for the relief requested in this application. Plaintiff will suffer irreparable harm if Plaintiff's request is denied given this Court has entered a judgment of dismissal with prejudice." Mohsin failed to explain why he would be unable to meet the filing

deadlines without ex parte relief. Given that Mohsin was able to file ex parte applications, it is unclear why he could not file a noticed motion. Mohsin's argument was too vague to support a finding that he would be irreparably harmed without ex parte relief. Therefore, the trial court did not err by denying his ex parte applications.

In the ex parte application, after the argument about filing deadlines, Mohsin wrote, "Additionally, a condition of obtaining bail in Bangladesh was to allow Plaintiff to return to the United States to resume prosecution of the instant case to adjudicate the issue of the source of the funds underlying the purchase of the Property." It is unclear why the foregoing fact was included in the argument. Nevertheless, we will infer Mohsin is asserting that his bail could be revoked in Bangladesh if he were not attending trial in California.

To the extent Mohsin intended to raise this argument, it fails because he does not assert (1) he obtained a hearing date for a noticed motion, (2) what hearing date he was given, (3) the precise conditions of his bail, and (4) why that hearing date would be too late for his bail conditions. Without this information, it cannot be shown that a noticed motion would be so late that Mohsin would be in jeopardy of having his Bangladeshi bail revoked. Accordingly, because exigent circumstances were not demonstrated, the trial court did not err by denying Mohsin's ex parte applications.

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

We concur:

McKINSTER
Acting P. J.

RAPHAEL
J.